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No. 90-1279

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

MYRA JO COLLINS,
Petitioner,

v.

THE CITY OF HARKER HEIGHTS, TEXAS,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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BRIEF FOR THE NATIONAL EDUCATION ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

This brief *amicus curiae* is submitted by the National Education Association (NEA) with the written consent of the parties, as provided in the Rules of this Court.

INTEREST OF THE *AMICUS CURIAE*

NEA is a nationwide labor organization with a current membership of more than two million persons, the vast majority of whom are employed by public school districts, colleges and universities. The issue presented in this case is whether the Constitution applies to (and in turn whether a § 1983 action will lie as the result of) certain conduct of governmental entities, most particularly actions taken in their capacity as public employers and more generally the performance of functions that are not uniquely "governmental" in nature. The members of

NEA, as public employees, have a direct interest in the disposition of this issue.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner brought an action under 42 U.S.C. § 1983 against the City of Harker Heights, Texas. She alleged that as a consequence of a municipal policy or custom of deliberate indifference to threats to the lives of employees in the City's sanitation and sewer department, her husband, a municipal sewer worker, was deprived of his life in violation of the substantive component of the Due Process Clause of the Fourteenth Amendment. Joint Appendix ("JA") at 4-9.

In dismissing petitioner's § 1983 suit for failure to state a claim, the Fifth Circuit found it unnecessary to decide whether petitioner had adequately alleged a violation by the City of her deceased husband's substantive due process right to life. JA at 48. Instead, the court held that to state a claim under § 1983, a plaintiff must allege *something more* than the violation of his or her constitutional rights by state or municipal government; in addition, the plaintiff must allege that the violation occurred while the government was acting *in its capacity as "a governing authority."* *Id.* at 45. In other words, to state a claim under § 1983, a plaintiff must, according to the court below, allege that he or she was victimized by an abuse of power that is uniquely "governmental" in nature. Because the City had acted only *in its capacity as an employer* with respect to petitioner's deceased husband —and was thus chargeable with "at most the abuse of power [of] which any private employer might be guilty" (*id.* at 51)—the court held that petitioner had failed to state a claim under § 1983.

In Part I below, we demonstrate that the Fifth Circuit erred by focusing on the capacity in which government acts, rather than on the "essential dichotomy" in our constitutional system between state and private action. *See* pp. 5-7, *infra*. Under the Constitution, government—as "the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct," *Owen v. City of Independence*, 445 U.S. 622, 651 (1980)—is held to a different and higher standard than would apply to a private party engaging in the same conduct. Thus, this Court has consistently and repeatedly held that government *in all capacities*, including its capacity as employer, must conform its conduct to constitutional requirements, even though private actors engaged in similar conduct are not subject to such requirements. *See* pp. 7-14, *infra*.

In Part II below, we identify the allegations that *are* necessary to make out a violation of the Constitution (and hence to state a § 1983 claim) in a case where, as here, damages are sought against government for allegedly depriving a person of a right protected by substantive due process. Essentially, a plaintiff must allege that *the governmental entity itself* has *arbitrarily or capriciously* (and not negligently) caused that deprivation. *See* pp. 14-21, *infra*. Petitioner has adequately made the necessary allegations here. *Id.*[1]

[1] A separate issue posed by the *writ of certiorari* is whether the Texas Hazard Communication Act, Texas Health and Safety Code, §§ 502.003 *et seq.* (Vernon 1990), gave petitioner's deceased husband a life or liberty interest in receiving safety training and equipment in accordance with its terms that was entitled to protection against state deprivation under the substantive component of the Due Process Clause of the Fourteenth Amendment. *Amicus* does not address that issue in this brief.

ARGUMENT

I. ACTIONS OF GOVERNMENT, IN ALL OF ITS CAPACITIES, INCLUDING ITS CAPACITY AS A PUBLIC EMPLOYER, ARE SUBJECT TO SCRUTINY UNDER THE CONSTITUTION.

A. Although the Fifth Circuit's decision is framed in terms of whether § 1983 provides a cause of action against a governmental entity charged with violating the Constitution in its capacity as an employer, the court's decision must be taken to mean that *the Constitution itself* imposes no obligations or restrictions on the government when acting as an employer. This is necessarily the case because, as this Court has repeatedly recognized, § 1983 creates no substantive law from which a distinction between "governmental" and "employment" actions by government might conceivably be drawn. *See Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617 (1979) ("[Section 1983] did not provide for any substantive rights—equal or otherwise. . . . [O]ne cannot go into court and claim a 'violation of § 1983'—for § 1983 by itself does not protect anyone against anything."). *Accord, e.g., Baker v. McCollan*, 443 U.S. 137, 140, 144 n.3 (1979); *Oklahoma City v. Tuttle*, 471 U.S. 808, 816 (1985) (plurality opinion); *Felder v. Casey*, 487 U.S. 131, 158 (1988) (O'Connor, J., dissenting).

Section 1983 creates a federal *remedy* for the violation of substantive rights that exist, not by virtue of § 1983, but by force of the Constitution or laws. *See, e.g., Chapman, supra*, 441 U.S. at 617-18; *Baker, supra*, 443 U.S. at 140, 144 n.3; *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 934 (1982); *Jett v. Dallas Independent School District*, 491 U.S. 701, 722-31 (1989). In the words of the Senate manager of § 1983, the statute is " 'so very simple and really reenact[s] the Constitution.' " *Lugar*, 457 U.S. at 934 (quoting Cong. Globe, 42d Cong., 1st Sess. 569 (1871) (statement of Senator Edmunds)). Thus, the Fifth Circuit's conclusion that § 1983 cannot be invoked to challenge employment-related conduct by the

government is necessarily a conclusion that *the Constitution itself* does not apply in this context.

The implications of the Fifth Circuit's decision are, in fact, even broader than this. Reduced to its essentials, the Fifth Circuit's reasoning is that an action is not uniquely "governmental," and is not subject to constitutional constraints, if the action is of a kind that a private entity could take. But that reasoning would apply not only to the government's actions as an employer, but to numerous other activities routinely engaged in by state and local governments—including the provision of education, transportation, sanitation, sewer and other public services—that are not and have not historically been the exclusive province of government.

B. The Fifth Circuit's position is, however, as incompatible with our constitutional system as it is pregnant with implications. The Fourteenth Amendment—which is the direct source of the substantive rights invoked by petitioner in this case, and which makes various other constitutional provisions applicable to the States, *see, e.g., Malloy v. Hogan*, 378 U.S. 1 (1964)—provides in pertinent part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Fourteenth Amendment does not purport to distinguish among various species of state action. To the contrary, the Amendment is broadly phrased to prohibit any and all forms of state action that violate the rights enumerated therein.

Following the plain language of the Fourteenth Amendment, this Court consistently has read the Amendment as establishing an "essential dichotomy . . . between deprivation by the State, subject to scrutiny under its provisions, and private conduct, 'however discriminatory or wrong-

ful,' against which the Fourteenth Amendment offers no shield." *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974) (emphasis added) (quoting *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948)). *Accord, e.g., Lugar, supra*, 457 U.S. at 936-37; *NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988). *Within* the universe of activities that constitute state action, however, this Court *never* has recognized a dichotomy between uniquely "governmental" functions on the one hand, and "employment" or "proprietary" functions on the other. To the contrary, as this Court held over one-hundred years ago in the *Civil Rights Cases*, 109 U.S. 3 (1883):

> Individual invasion of individual rights is not the subject-matter of the Amendment. It has a deeper and broader scope. It nullifies and makes void *all* state legislation, *and state action of every kind*, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty, or property without due process of law, or which denies to any of them the equal protection of the laws. [*Id.* at 11 (emphasis added).]

There is nothing surprising about this. Under our Constitution it is simply and indubitably the case that government—as "the social organ to which all in our society look for the promotion of liberty, justice, fair and equal treatment, and the setting of worthy norms and goals for social conduct," *Owen v. City of Independence*, 445 U.S. 622, 651 (1980)—is held to a different and higher standard than would apply to a private party engaging in the same conduct.

Whether or not the essential dichotomy between state and private action embodied in the Fourteenth Amendment "is good or bad policy, it is a fundamental fact of our political order." *Lugar, supra*, 457 U.S. at 937. And it is an equally fundamental fact that the Constitution is applicable to "state action of every kind," *Civil Rights Cases, supra*, 109 U.S. at 11, regardless of how comparable that state action might be in certain circumstances to the conduct of private actors.

C. In the public employment context in particular, this Court has on numerous occasions held that public employers must in their relations with employees conform their conduct to constitutional norms. To be sure, in these cases this Court has recognized that government in its capacity as employer has legitimate interests distinct from those it has in other capacities, and those interests must be taken into account in the constitutional balance just as any legitimate governmental interest must be taken into account. *See* pp. 12-13, *infra*. In *all* of these cases, however, the Court has clearly understood that the mere fact that the government is functioning as an employer does not render constitutional guarantees inapplicable.

For example, the employment practices of state and local governments must conform to the Equal Protection Clause of the Fourteenth Amendment. This is true with respect to classifications based on such factors as race, *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), sex, *Personnel Administrator v. Feeney*, 442 U.S. 256 (1979); *Forrester v. White*, 484 U.S. 219 (1988), age, *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976), and citizenship, *Sugarman v. Dougall*, 413 U.S. 634 (1973); *Foley v. Connelie*, 435 U.S. 291 (1978); *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982). Although a private employer might engage in discrimination of the same kinds as that in which a governmental employer engages, the Equal Protection Clause reflects that the eradication of *governmental* discrimination in all forms, including employment, "is of unique importance"—and hence of *constitutional* dimension. *Wygant, supra*, 476 U.S. at 290 (O'Connor, J., concurring in part and concurring in the judgment); *see also id.* at 277 (plurality opinion) ("[P]ublic employers, including public schools, . . . must act in accordance with a 'core purpose of the Fourteenth Amendment' which is to 'do away with

all governmentally imposed discriminations based on race.'") (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)).

Similarly, government must provide due process of law in the context of public employment. Thus, this Court has repeatedly held that those public employees who have property rights in their employment under state law may not be deprived of those rights by state or local governments without appropriate procedural safeguards. *See, e.g., Slochower v. Board of Higher Education*, 350 U.S. 551 (1956); *Connell v. Higginbotham*, 403 U.S. 207 (1971); *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Bishop v. Wood*, 426 U.S. 341 (1976); *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985); *NCAA v. Tarkanian*, *supra*. This Court has reasoned in these cases that while property interests "may take many forms," *Roth*, 408 U.S. at 576—including public employment—a property interest in *any* form triggers the protections of the Due Process Clause against deprivations by government. *Accord Goss v. Lopez*, 419 U.S. 565, 573 (1975).[2]

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[2] This Court's decision in *NCAA v. Tarkanian* illustrates with particular clarity that this principle holds true without regard for the fact that the Due Process Clause does not reach similar deprivations by *private* actors. That case involved a decision by the University of Nevada, Las Vegas ("UNLV")—a State University—to suspend its basketball coach, Jerry Tarkanian. The actual issue before the Court was whether the NCAA—a *private* actor—could be found to have acted jointly with UNLV in the decision to suspend Tarkanian so as to render the NCAA a "state actor" for purposes of that decision. Although the Court divided 5-4 in answering this question in the negative, all members of the Court agreed that the identity of UNLV as a *state* actor was sufficient in and of itself to trigger the protections of § 1983 and the Due Process Clause:

> Here the final act challenged by Tarkanian—his suspension—was committed by UNLV. A state university without question is a state actor. When it decides to impose a serious disciplinary sanction upon one of its tenured employees, it must comply with the terms of the Due Process Clause of the Fourteenth Amendment. . . . Thus when UNLV notified Tarkanian that he was being separated from all relations with the university's basketball program, it acted under color of state law within the meaning of 42 U.S.C. § 1983. [488 U.S. at 183, 192-93 (citations omitted); *accord id.* at 199 (White, J., concurring).]

The *substantive* guarantees of the Due Process Clause —which are invoked by petitioner in this case—are no less protected against infringement by government merely because the infringement occurs in the employment context. *See, e.g., Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974) (public employer's mandatory maternity leave policy for teachers violates substantive due process); *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978) (same); *Harrah Independent School District v. Martin*, 440 U.S. 194 (1979) (applying substantive due process analysis to actions of public employer); *Kelly v. Johnson*, 425 U.S. 238 (1976) (same).

That the Constitution defines the limits of state power in the employment context is further demonstrated by this Court's numerous decisions involving those provisions of the Constitution made applicable to the States by the Fourteenth Amendment. Thus, for example, the First Amendment delimits the power of state and local employers to hire, fire and promote employees based on political patronage, *Elrod v. Burns*, 427 U.S. 347 (1976); *Branti v. Finkel*, 445 U.S. 507 (1980); *Rutan v. Republican Party*, —— U.S. ——, 110 S. Ct. 2729 (1990), to penalize employees because of their speech, *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983); *Rankin v. McPherson*, 483 U.S. 378 (1987), to require nonmember employees to pay fees to a union as a condition of employment, *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977); *Lehnert v. Ferris Faculty Association*, 59 U.S.L.W. 4544 (U.S. May 30, 1991), to require loyalty oaths as a condition of employment, *Wieman v. Updegraff*, 344 U.S. 183 (1952); *Baggett v. Bullitt*, 377 U.S. 360 (1964);

Elfbrandt v. Russell, 384 U.S. 11 (1966); *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), to require belief in God as a condition of employment, *Torcaso v. Watkins*, 367 U.S. 488 (1961), and to deny employees and unions access to the workplace for speech-related activities, *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983).

Similarly, public employees are protected by the Fourth Amendment against unreasonable searches or seizures by their employers, *see O'Connor v. Ortega*, 480 U.S. 709 (1987); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), and by the Fifth Amendment from being dismissed for refusing to waive the privilege against self-incrimination in a criminal proceeding. *See Gardner v. Broderick*, 392 U.S. 273 (1968). These constitutional protections extend to public employees even though they do not extend to employees in the private sector who have suffered like deprivations at the hands of their employers.

D. Because the reasoning of the Fifth Circuit in this case would also exempt from constitutional oversight conduct by government in its capacity as "proprietor," *see* p. 5, *supra*, the Fifth Circuit's decision is at odds with numerous other decisions of this Court which illustrate that government is bound to conform to constitutional requirements even when it performs functions that also are performed by private actors.

Thus, both private schools and public schools are involved in educating students,[3] but the Court has consistently and repeatedly held that public school officials are subject to constitutional constraints in their treatment of students that their counterparts in the private sector are not. *See, e.g., Brown v. Board of Education, supra*

[3] Indeed, at the time that the Fourteenth Amendment was adopted, public education was predominately a private enterprise, at least in large segments of the country. *See Brown v. Board of Education*, 347 U.S. 483, 489-90 (1954).

(equal protection clause); *University of California Regents v. Bakke*, 438 U.S. 265 (1978) (equal protection clause); *Mississippi v. Hogan*, 458 U.S. 718 (1982) (equal protection clause); *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943) (first amendment); *Tinker v. Des Moines School District*, 393 U.S. 503 (1969) (first amendment); *Healy v. James*, 408 U.S. 169 (1972) (first amendment); *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) (first amendment); *Goss v. Lopez, supra* (procedural due process); *Board of Curators v. Horowitz*, 435 U.S. 78 (1978) (procedural and substantive due process); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (fourth amendment).

The Court's decision in *New Jersey v. T.L.O., supra*, is particularly instructive in this regard. There the Court explicitly addressed an argument that the applicability of the Constitution—in that case the Fourth Amendment—turned on the capacity in which the state actor was functioning. Specifically, it was argued that the Fourth Amendment had no application to searches and seizures by public school officials because the Amendment applies only to the core governmental function of criminal law enforcement, and because the conduct of school officials in searching students partakes more of a "parental" than a "State" function. *See* 469 U.S. at 333-37. The Court rejected these arguments, concluding that the touchstone for application of the Fourth Amendment is simply the presence of " 'governmental action—that is, . . . the activities of sovereign authority.' " *Id.* at 335 (quoting *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921)). *Cf.* pp. 5-7, *supra*.

The same principle holds true in other fields of public endeavor that might be characterized as "proprietary" in nature. *See, e.g., Lehman v. City of Shaker Heights*, 418 U.S. 298, 303 (1974) ("Because state action exists," the policies and practices of a public transit system with respect to advertising space are subject to scrutiny under the First Amendment); *United States v. Kokinda*, ——

U.S. ——, 110 S. Ct. 3115, 3119 (1990) (First Amendment applies to the decision of the United States Postal Service to restrict solicitation on postal premises); *Turner v. City of Memphis*, 369 U.S. 350 (1962) (airport restaurant operated under lease from municipality is subject to the strictures of the Fourteenth Amendment).

E. We do not suggest that it is *irrelevant* to constitutional analysis whether government has acted as "governor," "employer," or "proprietor." To the contrary, the context in which the government has acted often will be crucial in determining how the interests invoked by government in support of its conduct are to be assessed. Our point is simply that the government's status as employer or proprietor goes only to *the existence of a constitutional violation*—and not to the threshold question of the Constitution's applicability. *See, e.g., New Jersey v. T.L.O., supra*, 469 U.S. at 337 ("To hold that the Fourth Amendment applies to searches conducted by school authorities is only to begin the inquiry into the standards governing such searches. Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, what is reasonable depends on the context within which a search takes place."); *Cleveland Board of Education v. Loudermill, supra*, 470 U.S. at 541-43 (the guarantee of due process applies with full force to property interests in public employment; however, the question of what process is due is answered by "a balancing of the competing interests at stake," including "the private interest in retaining employment, the governmental interest in the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and the risk of an erroneous termination"); *O'Connor v. Ortega, supra*, 480 U.S. at 717 (public employees have legitimate Fourth Amendment privacy interests in being free from unreasonable searches and seizures by their employers; "[t]he operational realities of the workplace, however, may make *some* employees' expectations of privacy unreasonable when an intrusion is by a supervisor rather than a law enforcement official") (emphasis in original); *Rankin v. McPherson, supra*, 483 U.S. at 384 (in cases involving the discharge of public employees on the basis of their speech, a court must balance the competing interests at stake "in order to accommodate the dual role of the public employer as a provider of public services and as a government entity operating under the constraints of the First Amendment").[4]

[4] The manner in which the interests of government as employer or proprietor affect the constitutional analysis in a given case is well illustrated by two recent decisions of this Court: *National Treasury Employees Union v. Van Raab, supra*, which involved government *qua* employer, and *United States v. Kokinda, supra*, which involved government *qua* proprietor.

In both cases, the Court divided 5-4 on the question whether the plaintiff had made out a violation of the Constitution on the facts presented. In each case, this disagreement centered on the weight of the constitutional interests at stake and the counterweight of the government's asserted interests *as employer* or *as proprietor* in pursuing the challenged conduct. *Compare Von Raab*, 489 U.S. at 666-67 (mission of Custom Service would be compromised if it were required by Fourth Amendment to seek a search warrant before requiring employees to submit to random drug tests) *with id.* at 686 (Scalia, J., dissenting) (the interests asserted by the Custom Service in support of random drug testing are "feeble" and hence inadequate to justify the significant Fourth Amendment intrusion involved); *Kokinda*, 110 S. Ct. at 3122-23 (plurality opinion) (significant governmental interests in competing effectively in increasingly competitive mail service market justifies the infringement on First Amendment rights accomplished by ban on solicitation on postal premises) *with id.* at 3136-37 (Brennan, J., dissenting) (although governmental interest in preventing disruption of postal services is weighty, the government's restriction on solicitation is broader than necessary to serve that interest, thus creating an undue infringement of First Amendment rights).

In both cases, however, the Court was unanimous in its view that the Constitution provided the yardstick against which the government's conduct was to be measured. Thus, in *Von Raab*, the Court held that "[o]ur earlier cases have settled that the Fourth Amendment protects individuals from unreasonable searches conducted by

In sum, this Court's decisions leave no room for the Fifth Circuit's assertion that a constitutional claim—and hence a § 1983 action—can arise only when the government is acting in a uniquely "governmental" role, rather than in the capacity of an employer or proprietor. So long as state action of any kind is involved, *the Constitution* establishes the standard against which that state action must be judged.

II. TO STATE A CAUSE OF ACTION UNDER SECTION 1983 AGAINST A GOVERNMENTAL ENTITY FOR THE DEPRIVATION OF A RIGHT PROTECTED BY SUBSTANTIVE DUE PROCESS, A PLAINTIFF MUST ALLEGE THAT GOVERNMENT ITSELF HAS ARBITRARILY OR CAPRICIOUSLY (AND NOT NEGLIGENTLY) CAUSED THAT DEPRIVATION. PETITIONER HAS ADEQUATELY MADE THE NECESSARY ALLEGATIONS HERE.

A. The Fifth Circuit's approach may reflect a concern that not every act that would be regarded as a garden variety tort if committed by a private actor—such as

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the Government, even when the Government acts as an employer." 489 U.S. at 665. Similarly, in *Kokinda*, the Court held that "[t]he Government, even when acting in its proprietary capacity, does not enjoy absolute freedom from First Amendment constraints, as does a private business . . . ." 110 S. Ct. at 3119; *see also id.* at 3131 n.4 (Brennan, J., dissenting) (The government may not escape the reach of the First Amendment by asserting that it acts only in a proprietary capacity; nor does "[t]he fact that the government is acting as an employer or as a proprietor . . . exempt it from the distinct requirements of the Equal Protection Clause, . . . or the Due Process Clause, . . . or the Commerce Clause, . . . or the Privileges and Immunities Clause of Article IV.") (citations omitted).

Of course, some constitutional guarantees are more absolute than others, and thus will yield, if at all, only to an unusually compelling governmental interest. *See, e.g., Personnel Administrator v. Feeney, supra*, 442 U.S. at 273 (although the states are entitled to "wide discretion in framing employee qualifications, . . . any state law overtly or covertly designed to prefer males over females in public employment would require an exceedingly persuasive justification to withstand a constitutional challenge under the Equal Protection Clause of the Fourteenth Amendment").

simple negligence—be elevated to a wrong of *constitutional* dimension when committed by a state actor. That concern—which springs from the notion that the Framers of the Constitution generally had more pernicious acts of government in mind when they drafted that document, *see Daniels v. Williams*, 474 U.S. 327, 331-32 (1986)—surely is legitimate, but it is not adequately addressed by the Fifth Circuit's classification of governmental action; it exists even when government is acting in a "governmental" capacity, and is by no means unique to situations in which the government is acting in its capacity as employer or proprietor. For example, a police officer investigating criminal activity, or a prison official caring for involuntarily incarcerated inmates, or a welfare official distributing public benefits—all of whom might be said to be engaged in uniquely "governmental" activity of one form or another—are as capable in the course of their duties of committing acts of simple negligence as is government acting as an employer or proprietor. *See, e.g., Daniels, supra; Davidson v. Cannon*, 474 U.S. 344 (1986).

This being so, the proper focus in constitutional cases raising claims that sound in negligence is on the *degree of culpability* required of a state actor before a particular provision of the Constitution may be said to be violated; *not* on whether the conduct engaged in by the state actor can most appropriately be characterized as uniquely "governmental," "employment-related," or "proprietary" in nature. In other words, if (but only if) certain conduct by a state actor is sufficiently culpable to work a deprivation of *constitutional* magnitude, a claim for violation of the Constitution should lie under § 1983 without regard to the capacity in which that conduct has occurred.[5]

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[5] Indeed, this Court has held, in a case involving the government *qua* employer, that "[b]y the plain terms of § 1983, two—*and only two*—allegations are required in order to state a cause of action

The Court's decision in *Daniels*, *supra*,—relied on heavily by the Fifth Circuit in support of its novel approach to this case, *see* JA at 49—is, upon analysis, direct authority for the contrary approach outlined above. *Daniels* involved a § 1983 suit for damages by an inmate at a city jail who alleged that he was injured when he slipped on a pillow negligently left on the stairs by a correctional deputy stationed at the jail. The inmate contended that this negligent act by the state defendant had "deprived" him of liberty without due process of law within the meaning of the Fourteenth Amendment. *See* 474 U.S. at 328.

The Court rejected this contention on the ground that "the Due Process Clause is simply not implicated by a *negligent* act of an official causing unintended loss of or injury to life, liberty, or property." *Id.* (emphasis in original). The Court reasoned, based on the language and history of the Due Process Clause, that the Clause was "'intended to secure the individual from the arbitrary exercise of the powers of government,'" and that "lack of due care" by a government official simply did not amount to such an arbitrary exercise of power. *Id.* at 331-32 (quoting *Hurtado v. California*, 110 U.S. 516, 527 (1884)).

The correctional deputy in *Daniels* was engaged in conduct—the supervision of inmates incarcerated pursuant

under that statute." *Gomez v. Toledo*, 446 U.S. 635, 640 (1980) (emphasis added). Specifically, a § 1983 plaintiff must allege (1) "that some person has deprived him of a federal [constitutional or statutory] right;" and (2) "that the person who has deprived him of that right acted under color of state or territorial law." *Id.*; *accord, e.g., Parratt v. Taylor*, 451 U.S. 527, 535 (1981); *West v. Atkins*, 487 U.S. 42, 48 (1988). Accordingly, where a § 1983 claim alleges that a state actor deprived the plaintiff of a constitutional right, the key inquiry in determining whether the action may proceed to judgment is whether the plaintiff has adequately alleged a violation of the Constitution. That, however, is the very inquiry that the Fifth Circuit pretermitted in dismissing petitioner's § 1983 claim.

to the criminal laws—that might be characterized as uniquely "governmental" in nature. The Court, however, attached no significance to this point; the only relevant issue was whether the deputy—concededly a state actor for § 1983 purposes—could be said to have *abused* the powers of his state office through an act of simple negligence. The Fifth Circuit misreads the Court's opinion in *Daniels* in extracting from that opinion the unwarranted principle that even when a state actor *has* abused the powers of his position in a manner violative of constitutional liberties, the right of a § 1983 plaintiff to invoke the protections of the Constitution depends on whether government has acted in a uniquely "governmental," "employment," or "proprietary" capacity.

B. Petitioner in this case does *not* allege that her husband was deprived of his life through the mere negligence of the City of Harker Heights, Texas. To the contrary, petitioner alleges in her complaint that the City *consciously* and with *deliberate indifference* to threats to the lives of its employees directed those employees to perform tasks known by the City to be hazardous without providing them adequate training and equipment. *See* JA at 4-9. At this stage in the proceedings, the issue squarely posed by these allegations is whether it is *inconceivable* that petitioner could prove *any set of facts* that would entitle her to relief under § 1983 and the Due Process Clause.[6] We submit that the Eighth Circuit in *Ruge v. City of Bellevue*, 892 F.2d 738 (8th Cir. 1989), has—in circumstances indistinguishable from the case *sub judice*—properly applied this Court's precedents to hold that

[6] *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957) (citing "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief").

such allegations *do* state a cause of action under § 1983 and the Due Process Clause.[7]

1. As a threshold matter, the *Ruge* court properly recognized that under this Court's precedents, a § 1983 claim for violation of the Due Process Clause will not lie based on allegations that "the state [has] simply commit[ted] a tort." 892 F.2d at 741-42. In this respect, the *Ruge* court's judgment is based directly on this Court's holding in *Daniels*, *supra*. *See also Davidson*, *supra*, 474 U.S. at 347.

Although the Court in *Daniels* had no occasion to consider what level of culpability *over and above mere negligence* is necessary to make out a violation of the substantive component of the Due Process Clause in a case such as this, the *Daniels* Court did observe that "'[t]he touchstone of due process is protection of the individual against arbitrary action of government.'" 474 U.S. at 331 (quoting *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974)). *See also*, *e.g.*, *Slochower v. Board of Higher Education*, *supra*, 350 U.S. at 559 (same); *Cleveland Board of Education v. LaFleur*, *supra*, 414 U.S. at 640 ("the Due Process Clause of the Fourteenth Amendment requires that [state action] must not needlessly, arbitrarily, or capriciously impinge upon . . . a [person's] constitutional liberty"). Consistent with this position, the *Ruge* court concluded—properly we submit—that if the government were shown to have actively exposed its employees to the risk of death or serious injury by directing them to perform duties known by the government to be hazardous without even minimal warning or protection, such conduct would be sufficiently arbitrary and capricious to constitute a wrong of "constitutional dimensions." 892 F.2d at 742.

[7] The allegations of the plaintiff in *Ruge* were substantially similar to the allegations here. Thus, the plaintiff in *Ruge* alleged that the City of Bellevue, Nebraska had, in the conduct of its sewer department,

> formulated and adhered to a long standing policy of not shoring up the walls of ditches into which it sends its employees, that the City knew of the dangers of such conduct, that it continued to require its employees to work in such ditches, and that it intentionally failed to warn those employees of the dangers involved in such work. [892 F.2d at 740.]

Petitioner here has alleged a wrong no different in kind from that alleged in *Ruge*, and there is no basis under *Daniels*, *supra*, for the implication in the Fifth Circuit's opinion that such a wrong, if proved, would not offend the Constitution.

2. The *Ruge* court's holding on this issue is, moreover, in no way inconsistent with *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), as the Fifth Circuit also appeared to think. *See* JA at 51-52. The sole issue presented in *DeShaney* was whether the government had an affirmative duty under the Due Process Clause to protect a child against the dangers of "private violence" of which the government was aware, but which the government concededly "played no part in creating." 489 U.S. at 197. The Court answered this question in the negative, reasoning that the purpose of the Due Process Clause was "to protect the people *from the State*, not to ensure that the State protected them from each other." *Id.* at 196 (emphasis added).

In contrast, the municipal defendants in this case and in *Ruge* are alleged to have actively exposed their employees to known dangers of the government's own creation. More specifically, the municipal defendants in both cases are alleged to have *required* their employees to perform certain duties *that were under the direct control of the government*. The harm that befell the public employees in these cases is thus alleged to have been the direct and exclusive result of government as opposed to private misconduct. The *Ruge* court cited with approbation an earlier Eleventh Circuit case that draws this precise distinction:

> Thus, where the state abuses its governmental power through an alleged policy of actively placing a person into a situation of known danger the Constitution proscribes and limits such action. *Cf. Bradberry v. Pinellas County*, 789 F.2d 1513, 1517 (11th Cir. 1986) (distinguishing between situations where a state *actively places someone in danger* and where the state fails to help someone already exposed to a risk not created by the governmental body, and holding that no liability under section 1983 arises in the latter situation). [892 F.2d at 741-42 (emphasis added).]

3. The *Ruge* court also properly recognized that when the defendant in a § 1983 suit is, as here, *a municipality*, it may not be enough to show that the plaintiff has suffered a wrong of "constitutional dimensions." Because § 1983 does not permit damages liability to be imposed on a municipality on a *respondeat superior* theory, a plaintiff seeking such relief must also show that the constitutional deprivation he or she has suffered is fairly attributable to "the municipality *itself*." *City of Canton v. Harris*, 489 U.S. 378, 385 (1989) (emphasis in original). *See Ruge*, 892 F.2d at 740-41 & nn.2, 6. "It is only when the 'execution of the government's policy or custom . . . inflicts the [constitutional] injury' that the municipality may be held liable under § 1983." *City of Canton*, 489 U.S. at 385 (quoting *Monell, supra*, 436 U.S. at 694). *Cf. Chaloux v. Killeen*, 886 F.2d 247, 250-51 (9th Cir. 1989) (*prospective injunctive relief* can be awarded against municipality under § 1983 without proof of "policy or custom").

Petitioner has adequately alleged an unconstitutional municipal policy or custom here. According to petitioner, the City of Harker Heights, with knowledge that its employees were in obvious danger of being killed or seriously injured absent the proper training and equipment, consciously decided not to provide its employees with that training and equipment. JA at 4-9. Under *City of Canton, supra*, such a conscious decision by the City "may fairly be said to represent a policy for which the city is responsible, and for which the city may be held liable [under § 1983] if it actually causes injury." 489 U.S. at 390. *See also Ruge*, 892 F.2d at 741-42.

4. It is obvious from the foregoing that the burden of proof on a plaintiff in a case of this sort is a considerable one, but whether petitioner can meet that burden here is not the determinative question at this stage of the proceedings. Petitioner alleged that the City of Harker Heights has engaged in misconduct far more culpable than an ordinary tort and has, as a direct consequence of that misconduct, deprived petitioner's husband of the most precious right protected by the Constitution against infringement by the State: his life. We submit that these allegations state a cause of action under § 1983, and that petitioner should be allowed the opportunity to discover and proffer the requisite proof.

CONCLUSION

For the foregoing reasons the decision of the court below should be reversed.

Respectfully submitted,

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